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No. 85-2148

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

—

ROBERT SARGENT HALE, Petitioner

v.

UNITED STATES OF AMERICA

—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—

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QUESTION PRESENTED

Whether the defendant's right to privacy was violated by a conviction for receiving obscenity and pornography at his home for purely personal, noncommercial purposes.

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Robert Sargent Hale respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 784 F.2d 1465 and is reprinted in the Appendix hereto.

The memorandum decisions of the United States District Court for the Southern District of California have not been reported and are reprinted in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 21, 1986. A timely Petition for Rehearing was denied on April 29,

1986.

The Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 1: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Title 18 U.S.C. section 545 (reprinted in full in the Appendix): Whoever . . . receives . . . merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law . . . shall be fined . . . or imprisoned . . . ."

Title 18 U.S.C. section 2252 (reprinted in full in the Appendix): "Any person who . . . knowingly receives . . . any visual depiction that has been transported . . . in interstate or foreign commerce . . . (which) involves the use of a minor engaging in sexually explicit conduct . . . shall be punished . . . ."

Title 18 U.S.C. section 2255 (reprinted in the Appendix).

Title 19 U.S.C. section 1305 (reprinted in full in the Appendix): "All persons are prohibited from importing into the United States from any foreign country . . . any obscene book . . . "

STATEMENT OF THE CASE

Petitioner was indicted in the Southern District of California for violations of 18 U.S.C. 545 and 18 U.S.C. 2252(a)(2) based on charges he received illegally imported obscene material and received illegal pictures showing minors engaged in "sexually explicit conduct" when government agents delivered certain magazines and pictures to him at his home. Non-jury trial on stipulated facts resulted in a guilty verdict on ten counts and the Court of Appeals affirmed convictions on eight of the counts.

The District Court had jurisdiction under 18 U.S.C. 3231 and the Court of Appeals had jurisdiction pursuant to 28 U.S.C. 1291.

The stipulated facts indicated that in May, 1984, Mr. Hale placed an order with a distributor in the Netherlands for two magazines and four sets of photographs. It was agreed the material was ordered by Mr. Hale for purely personal, noncommercial purposes.

In April, 1984 a Customs Mail Technician at the Foreign Mail Facility in Oakland, California opened and inspected an envelope arriving from the Netherlands addressed to Mr. Hale at his home. The envelope contained an illustrated, sexually explicit magazine. Later, Customs inspectors at the same facility intercepted three more envelopes from the Netherlands addressed to Mr. Hale's home, each containing a set of ten sexually oriented photographs. Customs officials considered the magazine and pictures to be obscene and on that basis seized the contents of all four envelopes.

In June, Customs authorities sought a search warrant for Mr. Hale's home based on an affidavit recounting the inspection and seizure of the four envelopes in Oakland. Copies of the seized items were provided the magistrate. The affidavit disclosed a plan "to have the previously described envelopes delivered as addressed by an employee of the U.S. Postal Service" and then to execute the search warrant after delivery was accomplished.

A warrant was issued authorizing search of Mr. Hale's home for the four envelopes as well as "any other books, magazines, photographs, negatives or films depicting obscene, lewd, lascivious or indecent sexual conduct."

On June 25, 1984 a Postal Service letter carrier han-

ded Mr. Hale his mail including the four envelopes in the front yard of his home. After the mail was carried inside, watching Customs agents executed the search warrant and seized the still unopened envelopes located on the bed in Mr. Hale's bedroom.

In a memorandum decision, the district court judge determined Mr. Hale's receipt of illegal books and pictures at his home for personal, noncommercial purposes was not constitutionally protected and the Court of Appeals affirmed this decision.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD DECIDE WHETHER RECEIVING ILLEGAL BOOKS AND PICTURES AT A PERSON'S HOME FOR PRIVATE PURPOSES MAY CONSTITUTIONALLY BE PROHIBITED.

This case involves important questions regarding the constitutional powers of Congress to abridge freedom of speech by prohibiting certain books and pictures. Mr. Hale's offense consisted of "receiving" illegal pictures at his home. It was agreed Mr. Hale did not intend to sell, copy, transfer or even exhibit the pictures to anyone else. The Court should determine how far the government can go in regulating the content of private libraries in private homes.

Stanley v. Georgia, 392 U.S. 557, 565 (1969) affirmed Mr. Hale's right "to read or observe what he pleases" in the privacy of his own home, "free from state inquiry into the contents of his library." In ringing terms, *Stanley* holds:

> "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may

read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

The precise scope of the protection established by *Stanley v. Georgia* is still not clear. Obviously "a port of entry is not a traveler's home" for purposes of the protection, *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), *United States v. 12 200-Ft. Reels etc.*, 413 U.S. 123 (1973), and it would be unavailing "to compare a theater, open to the public for a fee, with the private home of *Stanley v. Georgia*." *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973). The commercial interests of a distributor engaging in the business of selling illegal pictures through the mail, *United States v. Reidel*, 402 U.S. 351 (1971), or carrying a commercial quantity of obscene material on a Trans-World Airlines plane, *United States v. Orito*, 413 U.S. 139 (1973), are much different than the interests of individuals protected by the holding of *Stanley v. Georgia*. The protections of *Stanley* do not extend outside a person's home, see *United States v. Miller*, 776 F.2d 978 (11th Cir. 1985), *cert. den.*, —— U.S. —— (No. 85-1177), nor is the commercial peddler of obscenity protected. Here, Mr. Hale received the pictures at his home for purely personal purposes.

The district court and the court of appeals both concluded Mr. Hale had no rights protected by *Stanley* since he received rather than possessed illegal pictures at his home. Even if it were possible to distinguish between "possession" and "receiving."[1] *Stanley* itself recognizes the "right to receive information and ideas" and the notion that "this right to receive information and ideas, regardless of their social worth . . . is fun-

[1] Receiving is nothing more than the initiation of a possession.

damental to our free society." 394 U.S. at 564. See also *Kleindienst v. Mandel*, 408 U.S. 753, 762-765 (1972); *Procunier v. Martinez*, 416 U.S. 396, 408-409 (1974); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). The "scope of the 'right to receive' referred to in *Stanley*" was left open in *United States v. Reidel*, 402 U.S. at 355; this is an appropriate case to define more clearly the right to receive established in *Stanley*. The right to privately receive and possess expression regardless of its social worth should be afforded broader protection than the right publicly or commercially to distribute such expression.

None of the reasons advanced in *United States v. Orito*, 413 U.S. at 143 to limit the protections of *Stanley* would justify criminal sanctions for Mr. Hale's receipt of pictures at his home. "Congress may regulate on the basis of the natural tendency of material in the home being kept private and the contrary tendency once material leaves that area . . . ." The legitimate governmental interest in protecting the public commercial environment by preventing illegal pictures from "entering the stream of commerce" is not served by removing items from a private home. Any governmental interest is of lesser magnitude than an individual's right to privacy in the sanctity of his own home.

Even the legitimate desire to deter sexual abuse of children articulated in *New York v. Ferber*, 458 U.S. 747, 756-762 to justify penalties for selling or advertising depictions of such activities is attenuated when purely private, noncommercial possession of pictures in one's home is involved. Targeting producers and distributors focuses enforcement against those responsible for the evil to be eradicated without violating an individual's right to read and observe what he chooses in the privacy of his own home. *Stanley* points out (394 U.S. at 568): "Because the right is so fundamental to our scheme of individual liberty,

its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws."

Government ransacking private papers and libraries in private homes formed part of the historical basis for the First Amendment detailed in *Marcus v. Search Warrant*, 367 U.S. 717, 724-728 (1961) and *Stanford v. Texas*, 379 U.S. 476, 481-484 (1965). Mr. Hale's privacy at his home is one of the core values protected by the Constitution. *Silverman v. United States*, 365 U.S. 505 511 fn. 4 (1961) expounds:

> "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution . . . a sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle."

To let Mr. Hale's convictions stand would be to sanction government interference with his right to receive all manner of expression regardless of its social worth, as well as his equally compelling right "to be let alone" in the privacy of his home. The scope of the privacy interests established by *Stanley v. Georgia* should be reaffirmed in this case.

CONCLUSION

For the foregoing reasons, petitioner Robert Sargent Hale prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

DATED: June, 1986

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee, No. 85-5163

v.

ROBERT S. HALE,

Defendant/Appellant.

Appeal from the United States District Court

Southern District of California

Argued and Submitted Jan. 8, 1986
Decided March 21, 1986

Before FARRIS, PREGERSON and NORRIS, Circuit Judges.

FARRIS, Circuit Judge:

Robert S. Hale appeals from his conviction for receiving child pornography in violation of 18 U.S.C. § 2252(a)(2) and for receiving obscene merchandise imported contrary to law in violation of 19 U.S.C. § 1305 and 18 U.S.C. § 545. We affirm in part.

STATEMENT OF THE CASE

On May 4, 1984 Hale placed an order by mail with Delta Books, a distributor in the Netherlands, for two magazines and four sets of photographs to be sent to

him by mail. He enclosed a check in full payment, and noted the order and $58.00 payment in his journal, along with the notation, (1) "Joe and His Uncle," (2) "Bambino," and that there were ten photos in each set.

On May 21, 1984, the Child Protection Act of 1984, P.L. No. 28-292, 98 Stat. 204 (1984) became effective, amending 18 U.S.C. § 2252(a)(2) to make it illegal to receive by mail any material depicting minors engaged in sexually explicit conduct.[1].

On May 24, 1984, Hale received notice from Customs authorities advising him that a set of ten photos addressed to him had been intercepted, appeared to be

1. 18 U.S.C. § 2252 provides:

(a) Any person who—

. . . .

(2) knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed . . . if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section. 18 U.S.C. § 2255 defines the terms used in § 2252.

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2)"sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising; and

(4) "organization" means a person other than an individual.

obscene within the meaning of 19 U.S.C. § 1305, and was therefore subject to seizure and forfeiture.[2]. Hale stipulated that he read the notice and elected to waive or abandon any interest he might have in the material by not responding.

On May 29, 1984, a Customs Mail Technician opened and inspected an envelope arriving in the country from the Netherlands addressed to Hale. Inside the envelope was a magazine entitled "Bambino 6." It had been ordered by Hale on May 4, 1984, and contained sexually explicit pictures.

2. 18 U.S.C. § 545 provides:

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

. . .

19 U.S.C. § 1305 provides:

(a) All persons are prohibited from importing into the United States from any foreign country. . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral. . . . No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the appropriate customs officer that the obscene or other prohibited articles contained in the package were enclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided. . . .

. . . .

On June 1, 1984 and June 12, 1984, Customs inspectors intercepted and inspected three more envelopes arriving from the Netherlands. The envelopes contained the remaining three sets of ten photographs that Hale had ordered on May 4, 1984. Customs officials considered the sexually explicit "Bambino" magazine and the three sets of pictures to be obscene and on that basis seized the contents of all four envelopes. No notice of the seizures was sent to Hale by the Customs Service and no forfeiture proceedings were ever commenced pursuant to 19 U.S.C. § 1305 in the appropriate district court.

On the basis of this evidence, a Customs Agent sought a search warrant for Hale's home. In his affidavit, the Agent recounted the inspection and seizure of the four envelopes, and provided copies of the seized materials to the magistrate. The agent stated his intention "to have the previously described envelopes delivered as addressed by an employee of the United States Postal Service," and then to execute the search warrant after delivery was confirmed.

On June 22, 1985, a magistrate issued a warrant authorizing the search of Hale's home for the "Bambino" magazine and the three sets of ten photographs which were to be delivered to Hale. The warrant also authorized search and seizure of "correspondence, receipts, bills of sale, order forms, advertisement brochures and other documents related to the importation, receipt, sale and/or distribution of said magazine and photographs or any other books, magazines, photographs, negatives, or films depicting obscene, lewd, lascivious or indecent sexual conduct, which are evidence, fruits and instrumentalities. . . ."

On June 25, 1984, the four envelopes containing the magazine and photographs were delivered to Hale at his home by a United States Postal Service carrier. The

packages were handed to Hale in the front yard of his home at 12: 40 p.m. The residence we then kept under constant surveillance by Customs officials until 2: 30 p.m. when agents served the search warrant.

Upon entering the residence, an agent advised Hale of his *Miranda* rights, which Hale waived. Hale told the agents that the envelopes were in his bedroom on the second floor of the residence. The agents seized the envelopes. Hale had not opened them, although it was apparent that they had been opened and inspected by Customs. Also seized from Hale's home were 45 books and magazines, among them "Joe and His Uncle" and Hale's handwritten records of his order for the two magazines and four sets of photographs.

The grand jury handed down a ten-count indictment. Five counts were based on violations of 18 U.S.C. § 2252, in that Hale knowingly received child pornography in the form of 3 sets of photos and 2 magazines. The other five counts were based on 19 U.S.C. § 1305 and 18 U.S.C. § 545, in that Hale knowingly received merchandise imported contrary to law.

Hale's motions to suppress, for return of property, and to dismiss were denied. Hale and the government thereafter stipulated that Hale did not intend to sell or distribute any of the magazines or pictures and that he intended to use all the magazines and pictures for his own personal use inside his home. It was further stipulated that an expert for the government would testify that the material shows minors under the age of 18 engaged in sexually explicit conduct within the meaning of 18 U.S.C. § 2255, including actual or simulated oral sex, masturbation, sexual intercourse and lewd exhibition of the genitals, in violation of 18 U.S.C. § 2252(a)(2), and that the materials are obscene. Hale also stipulated that he would not challenge on ap-

peal the sufficiency of the evidence to support a finding of obscenity.

Hale was found guilty in a bench trial on all ten counts. His sentence was suspended, and he was granted three years probation and fined $500.00. Hale filed a timely appeal. We have jurisdiction under 28 U.S.C. § 1291.

DISCUSSION

1. Was the warrant invalid?

The issues raised by Hale regarding the validity of the search warrant involve an application of law to fact requiring the consideration of legal principles. In such circumstances, particularly when constitution rights are implicated, our review is *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201-4 (9th Cir.)(en banc), *cert. denied*, —— U.S. ——, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

Hale argues first that the warrant is invalid because it was issued before the pornography was delivered. When evidence, however, is on a sure course to its destination, as in the mail, the prior issuance of a warrant is permissible. *United States v. Goff*, 681 F.2d 1238, 1240 (9th Cir. 1982). Hale's reliance on *United States v. Hendricks*, 743 F.2d 653 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1362, 84 L.Ed.2d 382 (1985) is misplaced. In *Hendricks*, the evidence was not on a sure and irreversible course to its destination; the defendant in that case was required to pick it up personally, an act which he might or might not have done if the government had not taken that decision out of his hands by attempting a controlled delivery. In the instant case, the evidence was in the mail addressed to Hale for home delivery; a controlled delivery pursuant to a warrant issued earlier is, in this situation, permissible.

Hale argues also that the warrant is invalid because it allowed for the search and seizure of unnamed "obscene, lewd, lascivious or indecent" material. Partial invalidity of a warrant (assuming arguendo that this portion of the warrant is invalid) does not taint the entire warrant. *United States v. Gomez-Soto*, 723 F.2d 649, 654 (9th Cir.), *cert. denied*, —— U.S. —— , 104 S.Ct. 2360, 80 L.Ed.2d 831 (1984); *United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982). The portion of the warrant that specifically described "Bambino" and the three sets of photographs is valid.

The only item which formed the basis for the indictment and conviction but was not specified in the warrant was the magazine "Joe and His Uncle." Under Supreme Court and Ninth Circuit precedent, the "First Amendment imposes special constraints on searches for and seizures of presumptively protected material . . . and requires that the Fourth Amendment be applied with 'scrupulous exactitude' in such circumstances." *Maryland v. Macon*, —— U.S. ——, 105 S.Ct. 2778, 2781-2, 86 L.Ed.2d 370 (1985); *United States v. Sherwin*, 572 F.2d 196, 199-200 (9th Cir. 1977), *cert. denied*, 437 U.S. 909, 98 S.Ct. 3101, 57 L.Ed.2d 1140 (1978); *United States v. Tupler*, 564 F.2d 1294, 1297 (9th Cir. 1977). As we have held, "Because of the First Amendment, the seizure of all publications must meet higher procedural standards than normal." *Sherwin*, 572 F.2d at 200.

These "higher procedural standards" take two forms. First, the warrant must specifically describe the material to be seized. Blanket clauses that do not refer to specific items and to material directly related to specific items are not proper bases for constitutional searches and seizures. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325, 99 S.Ct. 2319, 2323-24, 60 L.Ed.2d 920 (1979); *Roaden v. Kentucky*, 413 U.S. 496, 506, 93

S.Ct. 2796, 2802, 37 L.Ed.2d 757 (1973); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 511-12, 13 L.Ed.2d 431 (1965); *Sherwin*, 572 F2d at 200. Second, the exceptions to the warrant requirement are narrowly construed. The plain view exception argued by the government, for example, cannot be used to search for or seize alleged obscenity or alleged child pornography that is unspecified in the warrant. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 n. 5, 99 S.Ct. 2319, 2324 n. 5, 60 L.Ed.2d 920 (1979); *Sherwin*, 572 F.2d at 200. Otherwise, police officers could seize any publication or film they deem to be unprotected by the First Amendment, thereby subverting the higher procedural standards that require a neutral magistrate to make the initial determination of probable cause as to specific items. The fact that child pornography is unprotected by the First Amendment is irrelevant. All expression is presumptively protected at the time of the warrantless seizure; child pornography is no different in this regard from obscenity.

Applying these "higher procedural standards" to the seizure of "Joe and His Uncle," we conclude that the magazine was improperly seized and should have been excluded. There is no basis in the warrant for the seizure of "Joe and His Uncle." The first part of the warrant did not specifically describe the magazine, and the second part of the warrant is too general to support the seizure of material that was, at the time of the seizure, arguably protected by the First Amendment. Since there is no basis in the record for the seizure of "Joe and His Uncle," we consider whether the good faith exception to the exclusionary rule should nevertheless allow the introduction of "Joe and His Uncle" in evidence. *United States v. Leon*, —— U.S. ——, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Under *Leon*, evidence will not be suppressed if the officers

seized it in reasonable and good faith reliance on the warrant. *Id.* at 3422.

Hale objects that this issue was not raised in the district court and should not now be reviewed. Because the government prevailed at Hale's suppression hearing, however, there was no reason for the good faith exception to be raised. The government did not need to argue the *Leon* exception, because it was able to put "Joe and His Uncle" in evidence on the warrant alone. We therefore address the question.

Leon "requires officers to have a reasonable knowledge of what the law prohibits." *Leon* at 3420 n. 20 (citations omitted). Our holding, which applies existing law to the facts of this case, prohibits the seizure of "Joe and His Uncle" because it was not particularly described and because the blanket clause in the warrant is too general. As the Supreme Court observed in *Leon*, "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 3421 n. 23. Our holding that the warrant was impermissibly overbroad with respect to any material arguably protected by the First Amendment other than that specifically named rests on well-established current law, and it is not unreasonable to require executing officers to know it. Moreover, we have serious doubts whether material arguably protected by the First Amendment which is seized pursuant to overbroad provisions of a warrant can ever be admitted through the good faith exception. *See Leon*, 104 S.Ct. at 3422; *United States v. Washington*, 782 F.2d 807, 818 (9th Cir. 1986). Therefore, we reverse Hale's

convictions on the two counts based on "Joe and His Uncle."[3]

2. Was there sufficient evidence to support the conviction?

There is sufficient evidence to support a conviction if, reviewing the evidence in the light most favorable to the prosecution, any rational trier-of-fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979); *United States v. Marabelles*, 724 F.2d 1374, 1377 (9th Cir. 1984).

a. Did Hale knowingly receive materials imported contrary to law?

Hale's first argument on this issue is that the materials he received were not "imported" because customs had a duty under 19 U.S.C. § 1305 to seize the materials and because the materials never left the constructive possession of the government. The materials did in fact leave the possession of the government when Hale voluntarily accepted them through the mail. When he received the material through this permissible "controlled delivery," Hale completed the chain of importation. *See Illinois v. Andreas* 463 U.S. 765, 769, 103 S.Ct. 3319, 3322-23, 77 L.Ed.2d 1003 (1983). We need not decide whether the chain was completed prior to actual delivery.

We reject Hale's argument that the government's failure to seize the materials and begin forfeiture

3. Counsel for Hale contended at oral argument that reversal of the convictions based on the counts involving "Joe and His Uncle" would require reversal of the other convictions as well. As we make clear in part 2 of this opinion, however, there is sufficient evidence independent of "Joe and His Uncle" to support the other convictions.

proceedings nullifies his violation. The district court properly held that forfeiture proceedings exist to protect First Amendment interests from destruction and censorship rather than to alter the way the government seizes and holds evidence for a criminal investigation and trial. Hale had the right to request a judicial determination of obscenity, *Heller v. New York*, 413 U.S. 483, 492, 93 S.Ct. 2789, 2794-95, 37 L.Ed.2d 745 (1973). His election to waive that right by voluntarily entering into a stipulation precludes his challenge on appeal to the absence of such a hearing. *See Piepenburg v. Cutter*, 649 F.2d 783, 790 (10th Cir. 1981). Moreover, the procedures set out in § 1305 do not automatically create rights in criminal defendants who have allegedly violated that section. The violation antedates the forfeiture proceedings, and governmental non-compliance with the forfeiture proceedings does not absolve the defendant of his earlier violation.

Hale's final challenge to the sufficiency of the evidence is that he lacked the requisite scienter. He claims that the evidence is insufficient to show that 1) he knew the materials were imported contrary to law or 2) he knew the contents of the magazines and photographs.

He urges us to find that because the envelopes had obviously been opened and inspected before delivery and § 1305 requires seizure of imported obscenity, he could correctly assume that the government had sanitized his mail, delivering only permissible materials. He argues that this is especially true since other material had been inspected and seized.

We understand but reject the argument. Government agents are obligated to enforce laws, but their failure to do so does not provide a defense to violation of the plain language of the statute.

Hale's second argument is that, although he knew

the general nature of the material, he did not know the actual contents. This argument fails. Hale stipulated to the material's obscenity and its nature as child pornography. His statements upon his arrest, contained in the stipulations, indicated a clear intent to add child pornography to his collection of pornography. He recognized in his stipulation that a rational trier-of-fact could find him guilty. There is sufficient evidence to support the conclusion that he "knowingly received" the material.

3. Does Hale's conviction violate the ex post facto clause?

Hale was free of guilt in ordering the materials and in awaiting their delivery, even after the statute had been amended. Receiving the materials after the effective date of the amendment was a voluntary act that violated the statute. There was no violation of the ex post facto clause of the constitution.

4. Does Hale's conviction violate his right privately to possess printed expression?

Hale's argues that his conviction under § 2252 violates the rule of *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), which protects the private possession of books, films, and other forms of expression. We need not reach the argument. Hale was convicted for receiving the materials, not possessing them. *See United States v. Orito*, 413 U.S. 139, 141-42, 93 S.Ct. 2674, 2676-77, 37 L.Ed.2d 513 (1973) (Court rejects the reasoning that the right to possess obscene material in the home creates the correlative right to receive it, transport it, or distribute it). *See also United States v. Thirty-seven Photographs*, 402 U.S. 363, 370, 91 S.Ct. 1400, 1405, 28 L.Ed.2d 822 (1971); *United States v. Reidel*, 402 U.S. 351, 356, 91 S.Ct. 1410, 1412-13, 28 L.Ed.2d 813 (1971); *United States v. Miller*, 776 F.2d 978, 980-81 (11th Cir. 1985).

Affirmed in Part and Reversed in Part.[4] Since the Government substantially prevailed, it shall recover its costs.

4. The district court sentenced Hale on count one relating to "Bambino" to a fine of $500 and three years supervised probation conditional on participation in psychiatric treatment. The court then imposed sentences of three years probation for each of the remaining nine counts to run concurrently with the sentence for count one. Since our reversal of the two counts concerning "Joe and His Uncle" will not affect Hale's effective sentence, we need not remand to the district court for resentencing.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff, Crim. No. 84-0661-G

v.

ROBERT SARGENT HALE,

Defendant.

MEMORANDUM OF DECISION
Filed December 10, 1984

The defendant was indicted on eight counts arising from his receipt through the mail of four parcels containing child pornography. Counts 1-4 charged the defendant with knowingly receiving obscene materials that had been "imported contrary to law" in violation of 18 U.S.C. § 545, which subjects such materials to forfeiture pursuant to 19 U.S.C. § 1305. Counts 5-8 charged the defendant with knowingly receiving through the mail materials depicting minor children engaged in explicit sexual conduct, in violation of 18 U.S.C. 2252(a)(2).

On May 4, 1984, defendant placed an order to the Netherlands for magazines and photographs featuring child pornography, apparently for his own personal use within his home. On May 21, 1984, Congress passed the Child Protection Act of 1984, making it a crime to knowingly receive child pornography through the mails. Between May 24 and June 12, 1984, U.S. Customs technicians intercepted four parcels ad-

dressed to defendant, all containing child pornography. On June 12, Customs Special Agents made a controlled delivery of the four parcels to defendant's mailbox, where defendant retrieved them and carried them into his home. The agents then entered the house with a search warrant and found the above-mentioned materials, along with a large collection of erotica consisting primarily of child pornography.

Defendant moved to dismiss the indictment on the following grounds: 1) that 18 U.S.C. § 2252(a)(2) is unconstitutional because it permits the government to seize privately possessed expressive materials in violation of the First Amendment; 2) that 18 U.S.C. § 2252(a)(2) as applied to defendant was an *ex post facto* law in violation of the Sixth Amendment; 3) that the pornography could not have been imported "contrary to law" since they were delivered to his house, and 4) that any violation of the law resulted solely from a breach of duty by the customs officials. Defendant also asks that counts 1-4 of the indictment be dismissed since the seized materials were not given a timely forfeiture proceeding; that counts 2-4 and 6-8 be dismissed for lack of clarity and certainty; and that 45 other magazines seized at his home be returned to defendant because they are the fruits of an unauthorized seizure.

The Child Protection Act of 1984

On May 21, 1984, Congress enacted the Child Protection Act of 1984, which replaced the Protection of Children Against Sexual Exploitation Act of 1977. Through the new Act, Congress intended to attack the increasing problem of child pornography in the country by increasing prosecutorial powers in such cases. Among the more important changes in the law were the

elimination of the requirement that the defendant have transported, shipped, or received child pornography through the mail "for the purpose of sale or distribution for sale"; the elimination of the requirement that the child pornography be determined "obscene"; the raising of the definition of a minor protected by the statute from a person under the age of 16 to a person under the age of 18; the creation of a new offense of knowingly reproducing any visual depiction for distribution in commerce or through the mails; and the enlargement of penalties for violations under this section. 18 U.S.C. § 2252.

DISCUSSION

"Receipt" Under 18 U.S.C. § 2255(a)(2)

Defendant argues that 18 U.S.C. § 2252(a)(2) violates the First Amendment by punishing private possession of printed materials. "Receiving" the child pornography at his home, argues the defendant, is merely one aspect of "possessing" it, and therefore his right to receive such materials at his home for private use is constitutionally protected.

Private possession of obscene materials is protected by the First Amendment. *Stanley v. Georgia*, 394 U.S. 557 (1969). Moreover, most reported cases since *Stanley* involving seizures of obscene materials have taken place at locations other than private homes. *See, e.g., United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973); *United States v. Orito*, 413 U.S. 139 (1973). None of these cases, however, render unconstitutional a statute prohibiting *receipt* of child pornography at a private home. In *United States v. Orito*, 413 U.S. 139 (1973), the Supreme Court rejected the

notion that "the right to possess obscene material in the privacy of the home . . . creates a correlative right to receive it, transport it, or distribute it." *Id.* at 141. Therefore, contrary to defendant's contention, receipt of such material that has travelled in interstate or foreign commerce is not an element of possession. Hence First Amendment protection does not attach to the receipt of child pornography which comes through the mail to a private residence.

The question of whether mere possession of child pornography in the home is constitutionally protected will not be addressed herein, since the court has heretofore decided that receipt of child pornography through the mail is not protected by the First Amendment. The defendant herein is charged only with the act of receiving material and, because of the foregoing reasoning of the Court, the defendant's motion to dismiss on these grounds is denied.

Ex Post Facto Application of 18 U.S.C. § 2252

Defendant contends that he ordered the child pornography on May 4, 1984, more than two weeks before Congress passed 18 U.S.C. § 2252; thus he argues that punishing him for receiving the materials weeks later amounts to an *ex post facto* application of the statute.

Defendant suggests that the ordering of the materials and the subsequent receipt of those materials should be considered a single event, since the "defendant had no control over the date and time when the materials were to be delivered (and received). Indeed, once the items were ordered and paid for, there was no feasible way for defendant to prevent delivery." Although the defendant's argument has intuitive appeal, his novel expansion of the definition of the word "receipt" is unacceptable. "(T)o

'receive' something is to take it into possession and control. Thus when an object is taken into possession and control, it has been received." *U.S. v. Fikes*, 373 F. Supp. 1052, 1056 (E.D.Mi. 1974). While this narrower view of "receipt" does not vindicate defendant's argument that he had no choice but to receive the materials after he had ordered them, neither is it patently unfair to the defendant. To the same extent that defendant was guilty of a crime when he received the package, so he was also free of guilt while awaiting the packages even after the statute had been passed. Under 18 U.S.C. § 2252(a)(2), *receiving* child pornography is a crime; *ordering* such materials is not. Defendant cannot endeavor to enjoy the beneficial aspects of a law without suffering its burdens as well.

That the legislature intended to punish all knowing recipients of child pornography through the mails is evident in that the crime of "knowingly receives and distributes" is set out separately from "knowingly transports or ships" in the statute.[1] The paramount concern of Congress in passing this legislation was

[1] 18 U.S.C. § 2252(a) reads:

> Any person who
>
> (1) knowingly transports or ships in interstate or foreign commerce any visual depiction, if
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct; or
>
> (2) knowingly receives or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed, if—
>
> (A) the producing of such visual depiction involve the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;
>
> shall be punished as provided in subsection (b) of this section.

"the harm to children involved in child pornography schemes," which "exists whether or not those who initiate or carry out these schemes have a profit motive or commercial purpose." H.R. Rep. No. 98-536, 98th Cong., 2d Sess. 8, *reprinted in* 1984 U.S. Code Cong. & Ad. News 501. The legislature has not exceeded the scope of its powers in choosing to prosecute pedophiles who receive child pornography in the mail at their homes.

When, as in this case, there is no doubt that such a receipt occurred after the enactment of the statute violated by the receipt, the Sixth Amendment clause prohibiting *ex post facto* laws has not been violated. *United States v. Woods*, 696 F.2d 566 (8th Cir. 1982); *United States v. Hopkins*, 529 F.2d 775 (8th Cir. 1976), *cert. denied* 431 U.S. 965 (1977).

Lastly, we note that this was not a case in which the defendant made an effort to avoid receipt but failed. Agents observed the defendant willingly retrieve the envelopes from his mailbox and carry them into his house.

"Imported Contrary to Law"

Counts 1-4 of the indictment charge the defendant with importing obscene materials contrary to law in violation of 19 U.S.C. § 1305. Defendant suggests that since the customs officials initially seized the packages but then permitted them to be delivered to defendant's home, the materials were not "imported contrary to law."

In *United States v. One 1974 Jeep, Serial Number J4835TE17237*, 536 F.2d 1285 (9th Cir. 1976), the Ninth Circuit held that mere seizure of an article by the Government did not result in the article's losing its "contraband" character. In that case, the court

reasoned that the government must not be deprived of an effective method of obtaining evidence such as controlled deliveries, for such a result would be contrary to Congressional intent.

Alternatively, the defendant argues that 18 U.S.C. §1461 dictates an absolute duty on the part of customs officials and postal authorities to prevent the importation and delivery of allegedly obscene materials. Thus the defendant reasons that he was justified in believing that he was legally receiving the pornographic items and that he should not be held responsible for the failure of the customs officials in their duties.

The defendant's argument must be rejected. It would be contrary to legislative intent to hinder law enforcement from collecting evidence by not permitting them to use controlled deliveries. *See Illinois v. Andreas*, 103 S.Ct. 3319 (1983).

Forfeiture Hearings Pursuant to 19 U.S.C. § 1305

Counts 1-4 of the indictment charge the defendant with violation of 18 U.S.C. § 545 by receipt of "merchandise" "subject to seizure and forfeiture" pursuant to 19 U.S.C. § 1305. When books or other expressive materials are seized, 19 U.S.C. § 1305 requires that forfeiture hearings be commenced within fourteen days of the seizure and completed within 60 days of the commencement of the hearings. *United States v. Thirty-seven (37) Photographs, supra.* Since no forfeiture hearings were commenced within fourteen days of any of the seizures, which occurred on May 29, June 1, and June 12, defendant contends that the government is precluded from claiming the materials are forfeitable as obscene pursuant to Section 1305.

The government suggests that the search warrant

issued by the magistrate in the Southern District was sufficient indication that a judicial determination of obscenity had taken place. The government also submits that even if its failure to comply with the time requirements of section 1305 precluded forfeiture of the materials, that failure would in no way vitiate the § 545 prosecution. The Court disagrees with both of these conclusions.

Nothing in the history of obscenity law supports the government's proposal that a magistrate's decision to issue a search warrant suffices as a judicial determination of obscenity. The Supreme Court has indicated that such a determination must take place in an adversary hearing. *Freedman v. Maryland*, 380 U.S. 51, 60 (1965); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). A magistrate's decision to issue a search warrant cannot substitute for a determination by a trier of fact in an adversary hearing that materials are "obscene" and therefore properly subject to forfeiture. Having failed to comply with the constitutional requirements explicitly set forth by the Supreme Court in *United States v. Thirty-seven (37) Photographs*, *supra*—namely, that forfeiture proceedings be commenced within fourteen days of seizure and completed within 60 days of commencement—the government has failed to establish that the defendant received materials "subject to seizure and forfeiture" in violation of 18 U.S.C. § 545. Counts one through four of the indictment must therefore be dismissed.

Sufficient Clarity and Certainty in the Indictment

Defendant contends that two sets of three identically-worded counts in the indictment, each referring to a package containing child pornography, render the indictment fatally defective for failure to distinguish

among the different offenses. Defense counsel argues that if a jury were to find the defendant guilty on only some of the counts, there would be no way to distinguish which set of pictures applied to which count in the indictment. Such a flaw would be significant if the defendant later attempted to plead former acquittal or conviction, since confusion may ensue as to which counts the Grand Jury intended to apply to which offenses. *United States v. Panzavecchia*, 421 F.2d 440 (5th Cir. 1970).

The Government responds that it will attach exhibit numbers to each set of photographs, thus erasing any doubt as to which count of the indictment corresponds to which package. However, this response by the Government is insufficient, for exhibit numbers at trial will not prevent confusion in the future should the defendant wish to plead former conviction or acquittal. Due to this defect in the indictment, counts six, seven and eight are dismissed without prejudice.[2]

Return of Seized Magazines Not Named in the Warrant

There is not sufficient evidence before the court for the court to rule re this motion; therefore, the government may wish to offer more evidence.

In view of the foregoing, counts 1-4 of the indictment are dismissed with prejudice. Counts 6-8 of the indictment are dismissed without prejudice. The court is reserving its ruling re the motion to return the 45 magazines not named in the indictment. Defendant's remaining motions are denied.

IT IS SO ORDERED.

Dated: Dec. 10, 1984.

Earl B. Gilliam, Judge
United States District Court

[2] Counts two, three and four of the indictment are dismissed with prejudice, *supra*.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff Crim. No. 84-0661-G

v.

ROBERT SARGENT HALE,

Defendant.

ADDENDUM TO MEMORANDUM OF DECISION
Filed December 19, 1984

Upon reconsideration of the issue of forfeiture hearings pursuant to 19 U.S.C. § 1305, the Court amends its decision as follows:

Forfeiture Hearings Pursuant to 19 U.S.C. § 1305

Counts 1-4 of the indictment charge the defendant with violation of 18 U.S.C. § 545 by receipt of "merchandise" "subject to seizure and forfeiture" pursuant to 19 U.S.C. § 1305. When books or other expressive materials are seized, 19 U.S.C. § 1305 requires that forfeiture hearings be commenced within fourteen days of the seizure and completed within 60 days of the commencement of the hearings. *United States v. Thirty-seven (37) Photographs, supra.* Since no forfeiture hearings were commenced within fourteen days of any of the seizures, which occurred on May 29, June 1, and June 12, defendant contends that the government is precluded from claiming the materials are forfeitable

as obscene pursuant to Section 1305.

Defendant overlooks a critical difference between a criminal prosecution and a civil, *in rem* forfeiture action such as the one considered by the Supreme Court in *United States v. Thirty-seven (37) Photographs, supra.* Prior case law indicates that the Court intended the fourteen-day limit for commencement of a forfeiture proceeding to protect First Amendment interests in civil actions, not to bind the hands of the government in a criminal action. In *Freedman v. Maryland*, 380 U.S. 51, 58 (1965), for example, the Court wrote: "Applying the settled rule of our cases, we hold that a *non-criminal* process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." (Emphasis added.)

Thus it is evident that the Court wished to give greater latitude to the government in the investigation of criminal cases than in civil forfeiture actions or censorship proceedings. Toward this end, several cases have noted the difference between seizures of books or films for the sole purpose of their destruction, and seizures of such materials for the *bona fide* purpose of preserving it as evidence for a criminal proceeding. *See Heller v. New York*, 413 U.S. 483, 490 (1973); *Piepenburg v. Cutter*, 649 F2d783, 787-788 (10th Cir. 1983). Where materials are seized as evidence in a criminal proceeding, any interested party may request a judicial determination of obscenity. *Heller v. New York*, 413 U.S. at 492. If such a request is not made, however, the failure to hold such a hearing does not render the seizure unconstitutional. *Piepenburg v. Cutter*, 649 F.2d at 790.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff, Crim. No. 84-0661-G

v.

ROBERT SARGENT HALE,

Defendant.

MEMORANDUM OF OPINION AND ORDER
Filed May 2, 1985

The court has reviewed the pleadings submitted in the above-referenced matter. After taking of testimony and conclusion of oral argument, the court finds as follows:

FACTUAL BACKGROUND

For purposes of this motion, the facts are represented by counsel to be that defendant was indicted on eight counts arising for his receipt through the mail of four parcels containing child pornography. Counts one through four charged that defendant knowingly received obscene material that had been imported contrary to law, in violation of 18 U.S.C. § 545, which subjects such materials to forfeiture pursuant to 19 U.S.C. § 1305. Counts five through eight charged defendant with knowingly receiving through the mail materials depicting minor children engaged in explicit sexual conduct, in violation of 18 U.S.C. § 2252(a)(2).

A superseding indictment was filed on March 6, 1985, which alleged two additional counts under the

same statutes.

On May 4, 1984, defendant allegedly placed an order to the Netherlands for magazines and photographs featuring child pornography, apparently for his own personal use within his home. On May 21, 1984, Congress passed the Child Protection Act of 1984, making it a crime to knowingly receive child pornography through the mails.

Between May 24, 1984 and June 12, 1984, U.S. Customs technicians intercepted four parcels addressed to defendant, all containing child pornography. On June 12, 1984, Customs Special Agents made a controlled delivery of the four parcels to defendant's mailbox, where defendant retrieved them and carried them into his home. The agents then entered the house with a search warrant and found the materials, along with a large collection of erotica consisting primarily of child pornography.

MOTION TO DISMISS

Defendant brings his motion to dismiss on the grounds that counts five and ten violates his First Amendment rights. Defendant relies on the case of *Stanley v. Georgia*, 394 U.S. 557 (1969), and contends that said case allows an individual to possess this type of material in his own home. Defendant contends that "receiving" the materials is really only the starting point of "possession," and therefore is also constitutionally protected under *Stanley*.

The court finds the decision in *U.S. v. Orito*, 413 U.S. 139 (1973), to be controlling. In that case, the court rejected the notion that the right to possess obscene material in the home creates a correlative right to receive, transport or distribute that material. In this respect, then, 18 U.S.C. § 2252 is not constitutional,

and defendant's motion to dismiss counts five and ten is denied.

SUPPRESSION OF EVIDENCE AND RETURN OF PROPERTY

Defendant contends that he is entitled to suppression and return of the property seized from his home which was not detailed on the face of the search warrant, and bases his contention on three issues.

A. Probable Cause.

The facts are not disputed that the Customs Special Agent had intercepted and was personally holding the pornographic materials. The Agent obtained the warrant, which stated both that the materials were on defendant's premises and that the agent was holding the materials but would deposit them in the U.S. Mail for delivery prior to execution of the warrant.

After obtaining the warrant, the Customs Special Agent deposited the envelopes in the mail and waited for them to be delivered to defendant's address.

Defendant attacks this type of anticipatory warrant, and contends that there is no probable cause where the materials were within the exclusive control of the customs agent, because it was then within the agent's personal ability and discretion to "create" the probable cause on which the already-issued warrant was to be based.

The government argues that the case of *U.S. v. Hendricks*, 743 F.2d 653 (9th Cir., 1985), sanctions such an anticipatory warrant if the property is placed in the U.S. Mail for eventual delivery to its destination.

The court finds that there is no case law on this point in this circuit. The *Hendricks* decision provides only dictum as to the effect on probable cause of the various methods of delivery available to the government, and

this case is further complicated by the fact that the customs agent had personal custody of the material, and not the U.S. Post Office, at the time the warrant was obtained.

For the reasons set forth above, this court makes a factual determination that the statements contained within the affidavit of the customs agent, coupled with his verbal representations, were sufficient to enable the issuing magistrate to determine that there was probable cause. It was demonstrated that the materials would in fact be delivered in due course to their ultimate destination, and that the warrant would not be executed until such time as actual delivery was confirmed.

B. General Warrant.

Defendant contends that seizure of the allegedly obscene materials not specifically described in the warrant was unconstitutional under the First and Fourth Amendments. Defendant contends that, even under the "plain view" doctrine, items falling within the purview of the First Amendment are entitled to special protection, as set for in *Lo-Ji Sales, Inc., v. New York*, 442 US 319 (1979).

The court finds that the cases of *U.S. v. Ferber*, 102 S. Ct. 3348 (1982), and *U.S. v. Fogarty*, 663 F.2d 928 (9th Cir. 1981) are dispositive. Under current case law, child pornography is not afforded protection under the First Amendment, and items not specifically named in the search warrant are nevertheless subject to seizure if discovered during its execution.

C. Return of Property Seized.

Defendant contends that those materials which were not specifically identified in the search warrant, but which were additionally seized by officers during execution of the warrant, should be returned. Defendant makes his request based upon his contention that

his possession of those materials was not illegal. Effective May 21, 1985, the Child Protection Act was amended to make *receipt* of such materials illegal; however, the current and continued possession of such materials within his private residence was not and is not in violation of any statute.

The court finds that the determination of which materials are relevant to proof of the existing indictment counts must of necessity remain pending until time of trial. All of the materials were seized by officers as potentially relevant to prosecution of this case. Until such time as a factual determination of relevancy can be made, this motion for return of materials is premature. Those items which the court determines were legally within the possession of defendant at the time of seizure will be returned to him forthwith, and are not subject to forfeiture.

For the reasons set forth hereinabove, the court denies the motions of defendant Hale to dismiss, for suppression of evidence, and for return of property seized.

IT IS SO ORDERED.

Dated: May 1st, 1985.

Earl B. Gilliam, Judge
United States District Court

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT S. HALE,

Defendant-Appellant.

ORDER
Filed April 29, 1986

Before: FARRIS, PREGERSON, and NORRIS, Circuit Judges.

The only meritorious issue raised by Hale in his petition for rehearing concerns the return of property. Hale is entitled to the return of all property that is not contraband. *See Trupiano v. United States*, 334 U.S. 699, 710 (1948); *Goodman v. United States*, 369 F.2d 166 (9th Cir. 1966).

Accordingly, we remand to the district court for consideration of the seized materials. "Joe and His Uncle," which Hale admitted to be child pornography and which was proven beyond a reasonable doubt to be received illegally, is contraband and will not be returned. We form no opinion regarding the other material which we have not reviewed.

The petition for rehearing is denied.

Title 18, United States Code, Section 545:

"Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other documents or papers; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to ave been imported or brought into the United States contrary to law —

Shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 2252:

"(a) Any person who —

(1) knowingly transports or ships in interstate or foreign commerce or mails any visual depiction, if —

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if —

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;" shall be punished as provided in subsection (b) of this section.

"(b) Any individual who violates the section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000 or imprisoned not less than two years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000."

Title 18, United States Code, Section 2255:

"For purposes of this chapter, the term —

(1) 'minor' means any person under the age of eighteen years;

(2) 'sexually explicit conduct' means actual or simulated —

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) 'producing' means producing, directing, manufacturing, issuing, publishing, or advertising; and

(4) 'organization' means a person other than an individual.

Title 19, United States Code, Section 1305:

All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United

States, or forcible resistance to any law of the United States or containing any threat to take the life or inflict bodily harm upon any person in the United States, or any obscene book , pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representations, figure, or image on or of paper or other material or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or an advertisement of any lottery. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the appropriate customs officer that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent or consignee, the entire contents of the package in which such articles are contained shall be subject to seizure and forfeiture as hereinafter provided: Provided, that the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subdivision. Provided further, that the Secretary of the Treasury man. in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officers to await the judgement of the district court as hereinafter provided; and no protest shall be taken to the United States Court of International Trade from the decision of such

customs officer. Upon the seizure of such book or matter such customs officer shall transmit information thereof to the United States attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that suck book or matter thus seized is of the character, the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

(2)

Supreme Court, U.S.
FILED
AUG 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2148

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT SARGENT HALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D. C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2148

ROBERT SARGENT HALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his constitutional right to privacy entitled him to receive obscene materials that were mailed to him from abroad.

1. Following a bench trial in the United States District Court for the Southern District of California, petitioner was convicted on five counts of importing obscene materials, in violation of 18 U.S.C. 545, and five counts of receiving material involving the sexual exploitation of a minor, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to concurrent three-year periods of probation on each count and fined $500. The court of appeals affirmed on eight of the ten counts (Pet. App. A1-A13). In reversing his convictions on the remaining two counts, the court did not disturb petitioner's sentence (Pet. App. A13 n.4).

In May 1984, petitioner ordered two magazines and four sets of photographs from a distributor in the Netherlands. Later that month, Customs officials intercepted the first set of photographs and notified petitioner that the photographs were obscene and thus subject to seizure and forfeiture under authority of 19 U.S.C. 1305. Thereafter, Customs inspectors intercepted and seized four other envelopes arriving from the Netherlands, three of which contained the remaining sets of photographs and the last of which contained one of the magazines ordered by petitioner. Pet. App. Al-A4.

Rather than notify petitioner of these seizures, however, Customs officials sought a search warrant for petitioner's home. In support of their request for the warrant, the officials recounted in an affidavit the interception and seizure of the four parcels and provided copies of the seized materials to the magistrate. In addition, the officials explained that if the warrant were issued, they would "have the previously described envelopes delivered as addressed [to petitioner] by an employee of the United States Postal Service" before conducting a search of his residence. Pet. App. A4.

On June 22, 1984, the magistrate issued a warrant authorizing a search of petitioner's home for, inter alia, the three sets of photographs and the magazine described in the affidavit. Three days later, a postal carrier delivered four envelopes to petitioner containing the three sets of photographs and the magazine. Soon thereafter, Customs officials executed the search warrant and seized the four envelopes as well as 45 other books and magazines.[1] Pet. App. A4-A5.

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[1]The three sets of photographs and the magazine particularly described in the search warrant formed the basis for eight of the ten counts against petitioner. A second magazine seized during the search formed the basis for the remaining two counts. The court of appeals subsequently concluded that the search warrant did not describe the second magazine with sufficient particularity, and it therefore reversed petitioner's convictions on those two counts (see Pet. App. A7-A10).

2. Petitioner asserts (Pet. 4-7) that the decision of the court of appeals, which upheld his convictions for receiving obscene materials, conflicts with this Court's holding in *Stanley* v. *Georgia*, 394 U.S. 557 (1969). The court of appeals, however, properly concluded that *Stanley* protects no more than "the private *possession* of books, films, and other forms of expression" and does not immunize the receipt of such materials through the mails (Pet. App. A12 (emphasis added)).

In *Stanley* v. *Georgia*, this Court reversed a conviction for the knowing possession of obscene materials, holding "that the mere private possession of obscene matter cannot constitutionally be made a crime" (394 U.S. at 559). The basis for the Court's holding, however, lay in *Stanley's* First Amendment right to privacy—his "right to satisfy his intellectual and emotional needs in the privacy of his own home" (*id.* at 565). See *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) (plurality opinion) ("*Stanley's* emphasis was on the freedom of thought and mind in the privacy of the home."). Nothing in *Stanley* accorded obscene materials themselves any independent protection under the First Amendment. See, *e.g.*, *United States* v. *Orito*, 413 U.S. 139, 143 (1973). It therefore follows, as decisions of this Court subsequent to *Stanley* have made clear, that nothing in that decision limits the authority of Congress to regulate the distribution, transportation, or receipt of obscene materials. *United States* v. *Thirty-Seven Photographs*, 402 U.S. at 375-376; *United States* v. *Reidel*, 402 U.S. 351, 354-356 (1971). Cf. *Bowers* v. *Hardwick*, No. 85-140 (June 30, 1986), slip op. 8.

While Congress cannot constitutionally regulate the mere possession of obscene matter in the privacy of one's home, it can "declare it contraband and prohibit its importation," *United States* v. *Thirty-Seven Photographs*, 402 U.S. at 377, as well as its receipt through the mails, *United*

States v. *Reidel*, 402 U.S. at 354-356, without trenching upon legitimate privacy rights. Thus, it is settled that the right to possess obscene materials in the home does not confer upon the possessor the right to order the materials from abroad and cause their importation through the mails. See *United States* v. *Orito*, 413 U.S. at 143 ("we cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because * * * the material is intended for the private use of the transporter").[2]

3. Petitioner's reliance on *Stanley* is unavailing with regard to his convictions on the Section 2252 counts for an additional reason. Section 2252 punishes the receipt of materials involving the sexual exploitation of children. The purpose of the statute is not to regulate obscenity, as in the case of statutes dealing with the importation, transportation, and distribution of obscene materials (see 18 U.S.C. 552, 1462, 1465). Rather, the purpose of the child pornography statute is to combat the sexual exploitation and abuse of children. See Pub. L. No. 98-292, § 2, 98 Stat. 204 (congressional findings). As this Court has noted recently, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York* v. *Ferber*, 458 U.S. 747, 757 (1982). As the Court further noted, prevention of this form of child abuse requires more than "pursuing only those who produce the photographs and movies" (*id.* at 760). The compelling governmental interest in protecting children "afford[s] the State the leeway to regulate pornographic

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[2]Contrary to petitioner's suggestion (Pet. 5-6), this is not a case in which petitioner simply "received" the obscene materials; the evidence showed that he ordered them from overseas and therefore caused their importation through the mails. The fact that he did not personally carry the materials into this country cannot make a difference for constitutional purposes.

material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material" *id.* at 776 (Brennan, J., concurring)). Because the balance of the competing interests in the case of child pornography weighs so heavily in favor of the state, we submit that governmental regulation could reach even private possession of child pornography in the home without violating the First Amendment. See *Stanley* v. *Georgia*, 394 U.S. at 568 n.11. *A fortiori*, there is no constitutional bar to proscribing the receipt of such materials that have been transported in interstate or foreign commerce.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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